IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Henry W. Crumrine et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendants in Error.

Roy W. Canaga et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

The question at issue in the case at bar is not controlled by the recent decision of the United States Supreme Court in The United States v. Cohen Grocery Co. That decision turned upon the uncertainty of that portion of section 4 of the Act of August 10, 1917, as amended October 22, 1919, that made it unlawful "wilfully to make any unjust or unreasonable rate

or charge in handling or dealing in or with any necessaries," or "to conspire, combine, agree or arrange with any other person to exact excessive prices for any necessaries." (41 Statutes at Large 298.)

U. S. v. Cohen Grocery Co., decided Feb. 28, 1921.

The indictment here under consideration charges that the defendants (appellants)

"* * * did on or about the 6th day of April, A. D. "1920, knowingly, wilfully, unlawfully and feloniously "conspire, combine, agree and arrange together and "with other persons whose names are to the Grand "Jurors unknown, to limit the facilities for transport- "ing, supplying and storing many necessaries, to-wit: "foods, feeds and fuel, including many carloads of "oranges and lemons, and large quantities of potatoes, "wheat, lettuce, cabbage, asparagus, live stock ready "for slaughter for use as meat and fuel oil, by then "and there and by means of agitating, calling and "declaring a strike of railway yard men and switch "men and such other railway train men, shop men "and employees as could be induced to leave their em- "ployment, and the said defendants and each of them "were at said time employees of railways having yards "and terminals in the city of Los Angeles; that the "said railroads, to-wit, the Los Angeles and Salt Lake "Railroad, the Atchison, Topeka & Santa Fe Railroad "and the Southern Pacific Railroad are concerned in "and are engaged in transportation of passengers and "freight in interstate commerce between the state of "California and the various other states of the United "States; and the defendants well knew that such rail-

"roads were engaged in carrying as freight all man-
"ner and description of foods, feeds and fuel oil, which
"commodities were necessaries as described and set
"forth in section 1 of title one, of an act to amend an
"act entitled 'An act to provide further for the na-
"tional security and defense by encouraging the pro-
"duction, conserving the supply, and controlling the
"distribution of food products and fuel, approved
"August 10, 1917, and to regulate rents in the District
"of Columbia,' approved October 22, 1919.

"And the said defendants, well knowing such facts,
"began, instituted, agitated and spread a strike among
"the switch men and other men who were engaged in
"handling the freight trains of the said railroad com-
"panies in the city of Los Angeles and in the state
"and Southern Division of the Southern District of
"California; and because of such conduct on the part
"of said defendants, a strike of the switch men and
"yard men of said railroads in said district was de-
"clared, and the men employed by said railroad com-
"panies to handle their said freight trains as such yard
"men and switch men refused to do and perform their
"duties as such employees of said railroad companies,
"and because of such strike and refusal of the said
"yard men and switch men to perform their duties the
"said railroad companies were totally unable to trans-
"port or supply the said foodstuffs, feeds and fuel oil,
"and by such action of the said defendants the trans-
"portation of such foodstuffs, feeds and fuel oil was
"then and there prevented and the facilities for trans-
"porting the same were thereby limited; and because
"of such preventing and limiting of such transporta-
"tion facilities, many hundred carloads of said food-
"stuffs deteriorated and became spoiled and unfit for

"use as human food, and the transportation of said "animals for meat was prevented and the supply of "meats was thereby curtailed. * * *"

This indictment clearly follows the terms and provisions of section 9 of the Act of August 10, 1917, which reads as follows:

> "Sec. 9. That any person who conspires, com- "bines, agrees, or arranges with any other per- "son (a) to limit the facilities for transporting, "* * *, supplying, storing, * * * any neces- "saries; * * * shall, upon conviction thereof, be fined not exceeding $10,000 or be imprisoned for not more than two years, or both."

Section 9 was not amended.

The indictment, then, is not affected by the Cohen decision, inasmuch as that decision was founded upon a construction of section 4 of the "Lever Act" as amended Oct. 22, 1919.

ARGUMENT.

We shall address ourselves to appellants' points *seriatim*.

I.

Since the indictment states an offense under section 9 of the Lever Act, and such section is not open to the objection of the attempt to classify the citizens and exempt certain classes from the operation of the section, "The principal ground relied on for reversal" (appellants' brief, p. 9) is cut from under appellants' appeal.

Both the demurrer and the demurrer *ora tenus* were properly overruled.

Much authority is cited to the effect that the men had the right to strike. One of the cases cited by appellant is Hitchman Coal Etc. Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260. But that case does not help appellant. The court says (p. 253):

> "Defendants set up, by way of justification or "excuse, the right of workingmen to form unions, "and to enlarge their membership by inviting other "workingmen to join. The right is freely con- "ceded, provided the objects of the union be proper "and legitimate, which we assume to be true, in a "general sense, with respect to the union here in "question. Gompers v. Bucks Stove & Range "Co., 221 U. S. 418, 439, 55 L. Ed. 797, 805, 34 "L. R. A. (N. S.) 874, 31 Sup. Ct. Rep. 492. The "cardinal error of defendants' position lies in the "assumption that the right is so absolute that it "may be exercised under any circumstances and "without any qualification; whereas in truth, like "other rights that exist in civilized society, it "must always be exercised with reasonable re- "gard for the conflicting rights of others. Bren- "nen v. United Hatters, 73 N. J. L. 729, 749, 9 "L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 65 "Atl. 165, 9 Ann. Cas. 698. The familiar maxim, "'*Sic utere tuo ut alienum non laedas*'—literally "translated, 'So use your own property as not to "injure that of another person,' but by more prop- "er interpretation, 'so as not to injure *the rights* "of another' (Broom, Legal Maxims, 8th Ed.

Section 20 of the Act of October 15, 1914, 38 Statutes at Large, 738, does not make any kind or character of a strike lawful. The Hitchman, Etc. v. Mitchell case disposes of that theory.

See:

United States v. Norris, 255 Fed. 423.

Even if there could be a question as to the effect of this section 20, yet the act under which the prosecution was conducted was passed August 10, 1917, some three years later, and, being the later declaration of the legislative will, would control.

Henrietta M. & M. Co. v. Gardner, 173 U. S. 123, 43 L. Ed. 637.

It must be conceded that men have the right to work and to quit work; to organize for protection, or advancement of their interests; to conduct themselves as free men, but the Clayton Act

"* * * does not have the effect of legalizing "any act which was previously unlawful."

Kroker Etc. Co. v. Retail Etc., 250 Fed. 890; U. S. v. King, 250 Fed. 908.

It is asserted in the brief that the war terminated at the time of the armistice. The existence of a state of war is determined by the political department of the Government, and the courts will take judicial notice of such determination, and are bound by it.

Hamilton v. Kentucky Dist. Co., 251 U. S. 160;

In re Wulzen, 235 Fed. 362.

II.

Answering Appellants' "A."

We present that the act, in so far as the case at bar is involved is neither vague, indefinite or uncertain and that the immutable standard of guilt is fixed. The act is not open to the charges against it. It is plain, definite and certain. It provides what necessaries are in section 1, and makes it unlawful to conspire to limit the facilities for their transportation both in section 4 and section 9.

The "due process of law" contention is untenable. The act complies with all the requirements laid down in the decisions cited by appellant on pages 14 to 17 inclusive. We deem it supererogation to distinguish the case at bar from the Cohen and like cases, recently decided by the Supreme Court. The court said:

> "Observe that the section forbids no specific or definite act."

The portion of the section with which the court was dealing at that time is thus quoted in the opinion:

> "* * * we reproduce the section so far as relevant (Act of Oct. 2, 1919, c. 80, Sec. 2, 41 Stat. 397):
>
> " 'That it is hereby made unlawful for any per- "son wilfully * * * to make any unjust or "unreasonable rate or charge in handling or deal- "ing in or with any necessaries; to conspire, com- "bine, agree, or arrange with any other person "* * * (e) to exact excessive prices for any "necessaries * * * Any person violating any

"of the provisions of this section upon conviction "thereof shall be fined not exceeding $5000 or be "imprisoned for not more than two years, or both; "* * *"

The court, after holding that:

"the mere existence of a state of war could not "suspend or change the operation upon the power "of Congress of the guaranties and limitations "of the 5th and 6th amendments as to questions "such as we are passing upon." proceeds as follows:

"The sole remaining inquiry, therefore, is the "certainty or uncertainty of the text in question, "that is, whether the words 'That it is hereby "'made unlawful for any person wilfully * * * "'to make any unjust or unreasonable rate or "'charge in handling or dealing in or with any "'necessaries' constituted a fixing by Congress "of an ascertainable standard of guilt and are "adequate to inform persons accused of violation "thereof of the nature and cause of the accusa- "tion against them."

The court will note that this is a quotation from section 4 of the act and does not include any of the language of the act that applies to the violation at bar. The decision, therefore, cannot be construed to foreclose prosecutions under section 9, especially as section 22 of the act provides that if any clause, sentence, paragraph, or part of the act be adjudged to be invalid, this shall not affect or invalidate the remainder, but shall be confined in its operation to the clause, etc., directly involved.

The case of Weeds v. U. S., cited by appellant holds that a conspiracy to exact excessive prices is controlled by the Cohen case. This does not construe the law applicable to the case at bar.

III.

Appellant's "B."

Appellant has cited no case by the United States Supreme Court holding that the "due process of law" of the fifth amendment of the Constitution is violated by a law by Congress containing arbitrary classifications of the citizens.

We have found none. The doctrine of "due process of law" is older than Magna Charta and was embodied therein. It has been held that this phrase means "by the law of the land."

Murray v. Hoboken & Co., 15 U. S. 372;
Ochoa v. Hernandez y Morales, 230 U. S. 139;
Ex Parte Foscans, 208 Fed. 938;
Cooley, Cons. Lim., p. 434 (6th Ed. 1890).

It has been held that this phrase does not necessarily mean a trial or proceeding in court.

Davidson v. New Orleans 96 U. S. 102;
Public Clearing House v. Coyne, 194 U. S. 508;
Meeker v. Lehigh Val. R. Co., 236 U. S. 439;
In re Sing Lee, 54 Fed. 336;
Brown v. Lane, 232 U. S. 598.

The right of appeal is not essential to due process of law.

U. S. v. Heinze, 218 U. S. 532.

Deprivation of property without a proceeding in court is held not to contravene this provision.

Butterfield v. Stranahan, 192 U. S. 497.

The Interstate Commerce Act abrogating passes granted by railroads to individuals for life does not violate this provision.

Louisville Etc. Co. v. Mottley, 219 U. S. 467;
Delaware v. U. S. 231 U. S. 363.

The Food and Drugs Act providing for seizure approved:

Seven Cases v. U. S., 239 U. S. 510.

Webb Kenyon law not unconstitutional.

James Clark Dist. Co. v. Western Etc., 242 U. S. 326.

The Volstead Act does not transgress this provision, as was recently decided by our Supreme Court.

The "equal protection of the laws" provision is found in the fourteenth amendment and applies to the states only.

Am. Sug. Ref. Co. v. McFarland, 229 Fed. 284, 287;
Watson v. Maryland, 218 U. S. 173.

Even this provision permits a classification of the citizens where there is a reasonable and just cause therefor.

Connolly v. Union, Etc. Co., 184 U. S. 540, 560.

The object of the law under examination is declared to be,

> "* * * to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel, etc."
>
> Section 1, Act. Aug. 10, 1917, 40 Stat. 276.

To encourage production by farmers, etc., they were favored. This is no more a violation of the due process of law tenet than is the proposed emergency tariff on wheat with the same object.

But this argument and these authorities are not strictly in point here for the reason that section 9 of the act contains none of the exceptions complained of by appellant.

IV.

Appellants' "C."

It is undoubtedly true that the war power of Congress is a constitutional power. It is expressly given by the Constitution. Its power must not be exercised in contravention of the Constitution. The provision against limiting the facilities for transportation of necessities is no more unconstitutional than section one of the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. 209. This section provides that:

> "Every contract, combination in the form of "trust or otherwise, or conspiracy in restraint of "trade or commerce among the several states, or "with foreign nations, is hereby declared to be "illegal." And provides for punishment.

This section has been upheld, and applied to strikes and strikers.

U. S. v. Debs, 65 Fed. 210;
U. S. v. Cassidy, 67 Fed. 698;
Loewe v. Lawlor, 208 U. S. 274, 52 L. Ed. 488;
Thomas v. C. N. O. Etc. Ry., 62 Fed. 803, 12 C. J. p. 575, Sec. 79.

It is held by the courts that strikers may not impede or obstruct the transmission of the United States mails. The Lever Act makes conspiracies to limit transportation facilities for necessaries unlawful and hence a strike which has that effect is an unlawful strike just as is one which obstructs the mails.

The carrying of the necessaries of life is just as essential to the general welfare as the carrying of the mails. The indictment, then, charges an unlawful limiting of the facilities for transmitting and transporting necessaries. It is not open to any of the objections urged against it, and the judgment should be affirmed.

Respectfully submitted,

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